

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NETWORK APPS, LLC, a Washington  
limited liability corporation,

Plaintiff,

v.

AT&T INC., a Delaware corporation; AT&T  
CORP., a New York corporation; AT&T  
MOBILITY LLC, a Delaware limited liability  
company, AT&T SERVICES, INC., a  
Delaware corporation,

Defendants.

Case No. 2:16-cv-01852-TSZ

**DEFENDANTS' MOTION TO  
DISMISS OR ALTERNATIVELY TO  
TRANSFER**

**NOTE ON MOTION CALENDAR:  
April 7, 2017**

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. EACH OF PLAINTIFF’S CLAIMS SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6) .....	4
A. Legal Standard .....	4
B. Plaintiff Fails to Allege Any Facts Establishing that it Owns a Valid, Registered Copyright. ....	4
C. Plaintiff’s Breach of Contract Claim Should be Dismissed.....	5
1. Plaintiff fails to allege that it is a proper assignee of the Agreement or the Initial SOW with the right to bring this claim. ....	6
2. Plaintiff fails to allege any facts that it complied with the mandatory dispute resolution provision of the Agreement prior to bringing its breach of contract claim. ....	8
D. Plaintiff’s Minimal Allegations in its Trade Secret Misappropriation Claim Are Insufficient to Survive a Motion to Dismiss. ....	9
1. Plaintiff fails to state a claim upon which relief can be granted under the WUTSA. ....	10
2. Plaintiff fails to state a claim upon which relief can be granted under the DTSA. ....	12
E. Plaintiff’s Allegations of Patent Infringement Cannot Survive a Motion to Dismiss.....	13
1. Plaintiff fails to allege facts sufficient to allow the Court to infer that the accused product infringes each element of at least one claim of the Asserted Patent to support a claim for direct patent infringement. ....	13
2. Plaintiff’s allegations are wholly deficient to support its claim for willful infringement. ....	16
3. Plaintiff fails to allege that the allegedly infringing activities or components have no substantial non-infringing use to support a claim for contributory infringement.....	17
4. Plaintiff fails to allege that Defendants intended for their customers to infringe or that they knew that their customers’ acts constituted infringement to support a claim for induced infringement. ....	18
III. PLAINTIFF’S STATE LAW CLAIMS OF BREACH OF CONTRACT AND TRADE SECRET MISAPPROPRIATION SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(1).....	20
IV. IN THE ALTERNATIVE, THIS CASE SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1404(A).....	21
V. CONCLUSION.....	22

## TABLE OF AUTHORITIES

Page(s)

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	4, 13
<i>Baden Sports, Inc. v. Wilson Sporting Goods Co.</i> , Case No. 11-0603 (MJP), 2011 U.S. Dist. LEXIS 81433 (W.D. Wash. July 26, 2011) .....	10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	4, 13
<i>CAP Co., Ltd. v. Microsoft Corp.</i> , Case No. 14-cv-1899 (MJP), slip op., Dkt. #70 (W.D. Wash. Apr. 6, 2015) .....	17, 20
<i>Cascade Designs, Inc. v. Windcatcher Tech. LLC</i> , Case No. 15-cv-1310 (TSZ), 2016 U.S. Dist. LEXIS 11767 (W.D. Wash. Feb. 1, 2016) .....	10, 11
<i>Centaur Corp. v. On Semiconductor Components Indus., LLC</i> , Case No. 09-cv-2041 (BLM), 2010 U.S. Dist. LEXIS 8495 (S.D. Cal. Feb. 2, 2010) .....	9
<i>CG Tech. Dev., LLC v. Big Fish Games, Inc.</i> , Case No. 2:16-cv-00587 (RCJ), 2016 WL 4521682 (D. Nev. Aug. 29, 2016) .....	16
<i>Citoli v. City of Seattle</i> , 115 Wn. App. 459 (2002) .....	8
<i>Collins v. Quintana</i> , Case No. 15-cv-1619 (RAJ), 2016 U.S. Dist. LEXIS 11000 (W.D. Wash. Jan. 28, 2016) .....	6, 7, 8
<i>Cortec Indus., Inc. v. Sum Holding L.P.</i> , 949 F.2d 42 (2d Cir. 1991).....	6
<i>Cosmetic Ideas, Inc. v. IAC/InteractiveCorp.</i> , 606 F.3d 612 (9th Cir. 2010) .....	5
<i>Crafty Prods. v. Fuqing Sanxing Crafts Co.</i> , Case No. 15-cv-719 (BAS-JLB), 2016 U.S. Dist. LEXIS 136219 (S.D. Cal. Sept. 29, 2016) .....	5

**TABLE OF AUTHORITIES**  
(continued)

Page(s)

<i>Crystal Semiconductor Corp. v. TriTech Microelecs. Int’l, Inc.</i> , 246 F.3d 1336 (Fed. Cir. 2001).....	18
<i>Daniels-Hall v. Nat’l Educ. Ass’n</i> , 629 F.3d 992 (9th Cir. 2010) .....	4
<i>DSU Med. Corp. v. JMS Co.</i> , 471 F.3d 1293 (Fed. Cir. 2006).....	18
<i>Ervin v. Irani</i> , Case No. 2:13-cv-01373 (RSM), 2014 U.S. Dist. LEXIS 141496 (W.D. Wash. Oct. 3, 2014) .....	4, 5
<i>Gilbert v. New Line Prods.</i> , 490 Fed. Appx. 34 (9th Cir. 2012).....	5
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011).....	18
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016).....	16
<i>Hark C. Chan v. AT&amp;T Mobility LLC</i> , Case No. 11-cv-01766 (JLR), slip op., Dkt. #39 (W.D. Wash. July 18, 2012) .....	17, 19
<i>Hydrogen Master Rights Ltd. v. Weston</i> , Case No. 16-cv-474 (RGA), 2017 WL 78582 (D. Del. Jan. 9, 2017) .....	12
<i>Illumina, Inc. v. Life Tech. Co.</i> , Case No. 11-cv-3022 (JAH-DHB), slip op., Dkt. #67 (S.D. Cal. Sept. 22, 2016) .....	17, 19
<i>Johnson v. Columbia Prop. Anchorage, LP</i> , 437 F.3d 894 (Fed. Cir. 2006).....	21
<i>Kniesel v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005) .....	6
<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994).....	21

**TABLE OF AUTHORITIES**  
(continued)

Page(s)

<i>Limelight Networks, Inc. v. Akamai Techs., Inc.</i> , 134 S. Ct. 2111 (2014).....	15
<i>M.C. Dean, Inc. v. City of Miami Beach, Florida</i> , Case No. 16-cv-21731 (CMA), 2016 WL 4179807 (S.D. Fl. Aug. 8, 2016) .....	12, 13
<i>nexTUNE, Inc. v. McKinney</i> , Case No. 12-cv-1974 (TSZ), 2013 U.S. Dist. LEXIS 77128 (W.D. Wash. May 31, 2013) .....	11, 21
<i>Nikoonahad v. Rudolph Techs., Inc.</i> , Case No. 08-cv-2290 (PVT), 2009 U.S. Dist. LEXIS 40696 (N.D. Cal. May 13, 2009) .....	9
<i>North American Wellness Center, LLC v. Holmes</i> , Case No. 3:14-cv-2584 (CAB), 2015 WL 1291372 (S.D. Cal. Mar. 23, 2015) .....	21
<i>Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.</i> , 843 F.3d 1315 (Fed. Cir. 2016).....	18, 20
<i>RainDance Techs. Inc., v. 10x Genomics, Inc.</i> , No. 15-cv-00152 (RGA), slip op., Dkt. #28 (D. Del. Mar. 4, 2016) .....	13
<i>Rainero v. Archon Corp.</i> , 844 F.3d 832 (Fed. Cir. 2016).....	20
<i>Robern, Inc. v. Glasscrafters, Inc.</i> , Case No. 2:16-cv-01815 (JMV), 2016 WL 3951726 (D.N.J. July 22, 2016).....	13
<i>Simplivity Corp. v. Springpath, Inc.</i> Case No. 4:15-cv-13345 (TSH), 2016 WL 5388951 (D. Mass. July 15, 2016) .....	16
<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011) .....	4, 13
<i>TeleSign Corp. v. Twilio, Inc.</i> , Case No. 16-cv-2106 (PSG), 2016 WL 4703873 (C.D. Cal. Aug. 3, 2016).....	13, 14, 15
<i>United States v. Int’l Fidelity Insurance Co.</i> , Case No. 16-5142 (RBL), 2016 WL 5920091 (W.D. Wash. Oct. 11, 2016).....	21, 22

**TABLE OF AUTHORITIES**  
(continued)

Page(s)

<i>Vita-Mix Corp. v. Basic Holding, Inc.</i> , 581 F.3d 1317 (Fed. Cir. 2009).....	18
<i>Warren v. Fox Family Worldwide, Inc.</i> , 171 F. Supp. 2d 1057 (C.D. Cal. 2001) aff'd, 328 F.3d 1136 (9th Cir. 2003) .....	6
<i>WBIP, LLC v. Kohler Co.</i> , 829 F.3d 1317 (Fed. Cir. 2016).....	16
<b>Statutes and Rules</b>	
17 U.S.C. § 411(a) .....	1, 5
18 U.S.C. § 1836(b)(1) .....	12
18 U.S.C. § 1839(3) .....	12
28 U.S.C. § 1331, § 1332, § 1332(a) and § 1338(a) .....	3, 20
28 U.S.C. § 1404(a) .....	1, 3, 21, 22
35 U.S.C. § 271 et seq.....	3, 20
Federal Rule of Civil Procedure 12(b)(1) .....	1, 3, 20, 21
Federal Rule of Civil Procedure 12(b)(6) .....	1, 4
Federal Rule of Civil Procedure 84 .....	13
RCW 19.108.010(4).....	10
RCW 19.108.900(2)(a) .....	9
Copyright Act.....	5
Defend Trade Secrets Act .....	10, 12
Washington Uniform Trade Secrets Act.....	10, 12

1 Defendants AT&T Corp., AT&T Mobility LLC, and AT&T Services, Inc. (collectively,  
2 “Defendants”) move pursuant to (1) Rule 12(b)(6) to dismiss Plaintiff Network Apps, LLC’s  
3 claims for copyright infringement, breach of contract, misappropriation of trade secrets, and  
4 patent infringement and (2) Rule 12(b)(1) to dismiss Plaintiff’s state law claims for breach of  
5 contract and trade secret misappropriation.<sup>1</sup> In the alternative, Defendants move pursuant to 28  
6 U.S.C. § 1404(a) to transfer this case to the Southern District of New York.

7 **I. INTRODUCTION**

8 Plaintiff’s Complaint alleges various claims for breach of contract (Dkt. #1 at pp. 11-12,  
9 ¶¶ 37-43), copyright infringement (*id.* at p. 13, ¶¶ 44-49), misappropriation of trade secrets (*id.*  
10 ¶¶ 50-55), and patent infringement (*id.* at p. 14, ¶¶ 56-62). Each of Plaintiff’s claims suffers  
11 from the same deficiency – Plaintiff has made only threadbare or conclusory allegations without  
12 providing any factual allegations to support its claims. Accordingly, each of Plaintiff’s claims  
13 should be dismissed pursuant to Rule 12(b)(6) because they are each wholly deficient and  
14 inadequately pled, failing to state a claim upon which relief can be granted.

15 First, the Court should dismiss Plaintiff’s copyright claim because Plaintiff failed to  
16 allege the existence of a valid copyright or that it registered for a copyright. The law is clear –  
17 “no civil action for infringement of the copyright in any United States work ***shall be instituted***  
18 ***until*** preregistration or registration of the copyright claim has been made in accordance with this  
19 title.” 17 U.S.C. § 411(a) (emphasis added). Thus, although Plaintiff alleges that Defendants  
20 have infringed its “protectable copyright,” Plaintiff makes no factual allegations sufficient to  
21 satisfy 17 U.S.C. § 411(a).

22 Second, Plaintiff’s breach of contract claim should be dismissed because: (1) Plaintiff is  
23 not a party or an assignee to the Professional Services Agreement (the “Agreement”) or the  
24 Initial Statement of Work (the “Initial SOW”) between Mya Number, LLC and AT&T Services,

---

25 <sup>1</sup> To the extent Plaintiff’s state law claims of breach of contract and trade secret misappropriation are not dismissed  
26 as a threshold matter under Rule 12(b)(1), Plaintiff has also failed to sufficiently state a claim under Rule 12(b)(6).

1 Inc., and thus has no rights to enforce those agreements; and (2) Plaintiff fails to allege  
2 compliance with the mandatory dispute resolution provision of the Agreement prior to filing this  
3 suit. Moreover, because Plaintiff is not a party to those agreements, the explicit assignment  
4 clause in the Agreement requires Defendants' written consent for assignment of the Agreement  
5 or that written notice be provided to Defendants of any acquisition of the original signatory.  
6 Plaintiff provides no factual allegations showing compliance with this clause.

7 Third, although Plaintiff fails to state whether its trade secret misappropriation claim is  
8 brought pursuant to state or federal law (which by itself warrants dismissal), its claim under  
9 either is insufficient. Under either law, Plaintiff was required to plead that it has a legally  
10 protectable trade secret by establishing that it took reasonable efforts to maintain the secrecy of  
11 the alleged trade secret and that the alleged trade secret derives independent economic value  
12 from not being generally known or readily ascertainable by others. Plaintiff provides no factual  
13 allegations to satisfy either requirement. Moreover, Plaintiff fails to adequately describe the  
14 information it contends is a trade secret and fails to provide more than a formulaic recitation that  
15 "AT&T has misappropriated Plaintiff's trade secrets."

16 Fourth, Plaintiff's claim for direct infringement of U.S. Patent No. 9,438,728 (the "'728  
17 Patent" or "Asserted Patent") fails to satisfy the pleading requirements and should be dismissed.  
18 After the abolishment of Form-18, courts have been clear that a claim for direct patent  
19 infringement must include allegations to permit this Court to infer that the accused product  
20 infringes *each element of at least one patent claim*. Plaintiff's threadbare allegation that  
21 Defendants infringe at least "each independent claim of the '728 Patent" without providing any  
22 information as to how Defendants' allegedly infringe each element of even one claim is  
23 insufficient.

24 Plaintiff's willful infringement allegations similarly fail and should be dismissed. To  
25 state a claim for willful infringement, Plaintiff must plead as a threshold matter that Defendants  
26 had knowledge of the '728 Patent. Here, Plaintiff fails to allege any facts showing that



1 Defendants knew of the patent (or its application) prior to the filing of Plaintiff's Complaint, let  
2 alone any facts suggesting that Defendants' conduct is sufficiently egregious to support willful  
3 infringement.

4 Likewise, Plaintiff fails to plead facts sufficient to satisfy the pleading requirements for  
5 its contributory and induced infringement claims, including failing to plead that Defendants had  
6 knowledge of the '728 Patent before filing this lawsuit. Moreover, Plaintiff fails to allege that  
7 the accused products have no substantial non-infringing uses, a required element of a claim for  
8 contributory infringement. Plaintiff also fails to allege that Defendants' customers directly  
9 infringed and that Defendants knew their customers' acts constituted infringement, as required  
10 for a claim for induced infringement. Plaintiff's threadbare allegations fail to adequately plead a  
11 claim for either contributory or induced infringement.

12 Finally, Plaintiff's state law claims should be dismissed pursuant to Rule 12(b)(1).  
13 Although Plaintiff alleges both federal and state law claims, its alleged basis for subject matter  
14 jurisdiction is "28 U.S.C. § 1331, § 1332, and § 1338(a) because this action arises under the  
15 patent laws of the United States, including, 35 U.S.C. § 271 et seq." Dkt. #1, at p. 4, ¶ 10. Even  
16 though Plaintiff cites generally to § 1332, it omits sufficient factual allegations of either diversity  
17 jurisdiction or supplemental jurisdiction to allow this Court to properly exercise jurisdiction over  
18 Plaintiff's state law claims for breach of contract or trade secret misappropriation. Because this  
19 Court is presumed to lack subject matter jurisdiction until the Plaintiff establishes otherwise,  
20 Plaintiff's state law claims should be dismissed.

21 Alternatively, pursuant to the forum selection clause of the Agreement, Plaintiff was  
22 legally obligated to bring any lawsuit in the Southern District of New York ("S.D.N.Y."). Where  
23 a valid forum selection clause exists, that clause should control except in unusual cases. Thus, in  
24 the event it is not dismissed, this case should be transferred to the S.D.N.Y. pursuant to 28  
25 U.S.C. § 1404(a).

1 **II. EACH OF PLAINTIFF’S CLAIMS SHOULD BE DISMISSED PURSUANT TO**  
2 **RULE 12(B)(6)**

3 **A. Legal Standard**

4 Under Rule 12(b)(6), “a plaintiff’s obligation to provide the ‘grounds’ of his  
5 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a  
6 cause of action’s elements will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545  
7 (2007). The “[f]actual allegations must be enough to raise a right to relief above the speculative  
8 level,” *id.* at 555, and “to give fair notice and to enable the opposing party to defend itself  
9 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). “To survive a motion to  
10 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
11 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  
12 *Twombly*, 550 U.S. at 570). In addition, a properly pleaded Complaint must include “factual  
13 content that allows the court to draw the reasonable inference that the defendant is liable for the  
14 misconduct alleged.” *Id.* Thus, “threadbare recitals of a cause of action’s elements, supported  
15 by mere conclusory statements,” will not suffice, *id.* at 663, and although the Court must accept  
16 as true all well-pleaded allegations within the Complaint, it need not accept as true “allegations  
17 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences,”  
18 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

19 **B. Plaintiff Fails to Allege Any Facts Establishing that it Owns a Valid,**  
20 **Registered Copyright.**

21 Plaintiff’s copyright infringement claim should be dismissed because it fails to provide  
22 any factual allegations that Plaintiff is the owner of a valid, registered copyright. “To establish  
23 copyright infringement, Plaintiff[] must prove two elements: (1) ownership of a valid copyright,  
24 and (2) copying of constituent elements of the work that are original.” *Ervin v. Irani*, Case No.  
25 2:13-cv-01373 (RSM), 2014 U.S. Dist. LEXIS 141496, at \*15 (W.D. Wash. Oct. 3, 2014) (citing  
26 *Fiest Publ’n Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 360 (1991)). In particular, the

1 Copyright Act provides that “no civil action for infringement of the copyright in any United  
2 States work shall be instituted until preregistration or registration of the copyright claim has been  
3 made in accordance with this title.” 17 U.S.C. § 411(a). Accordingly, Plaintiff may not pursue  
4 an infringement claim unless it first files an application for registration with the Copyright Office  
5 before filing a lawsuit. *See Gilbert v. New Line Prods.*, 490 Fed. Appx. 34, 36 n.1 (9th Cir.  
6 2012) (citing *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp.*, 606 F.3d 612, 621 (9th Cir. 2010)).

7 Here, Plaintiff fails to allege the existence of any copyright, let alone a valid, registered  
8 copyright. *See* Dkt. #1 at p. 13, ¶ 45 (stating only that “Plaintiff owns a **protectable** copyright in  
9 all source and executable codes, and derivative works therein, developed by Mya Number for  
10 NumberSync” (emphasis added)).<sup>2</sup> Plaintiff did not attach a registration certificate, provide a  
11 registration number, attach an application for registration, or allege that it has sought registration  
12 of its alleged copyright. *See Ervin*, 2014 U.S. Dist. LEXIS 141496, at \*15 (dismissing the  
13 copyright infringement claim where “[p]laintiffs are still unable to show that they own a valid  
14 copyright”) (citation omitted); *Crafty Prods. v. Fuqing Sanxing Crafts Co.*, Case No. 15-cv-719  
15 (BAS-JLB), 2016 U.S. Dist. LEXIS 136219, at \*11-16 (S.D. Cal. Sept. 29, 2016) (same).  
16 Moreover, Plaintiff fails to satisfy the requirement that it at least plead “receipt by the Copyright  
17 Office of a complete application.” *Cosmetic Ideas, Inc.*, 606 F.3d at 621.

18 Because Plaintiff has failed to plead a legally cognizable copyright infringement claim,  
19 that claim should be dismissed.

20 **C. Plaintiff’s Breach of Contract Claim Should be Dismissed.**

21 Plaintiff’s breach of contract claim should be dismissed because: (1) Plaintiff is not a  
22 party or an assignee to the Agreement or the Initial the SOW that it now seeks to enforce; and (2)  
23 Plaintiff fails to allege compliance with the mandatory dispute resolution provision of the  
24

25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiff also does not identify which alleged copyrighted property Defendants purportedly infringed.

1 Agreement prior to filing this suit. See Declaration of Lindsay M. White,<sup>3</sup> Exs. A and B.<sup>4</sup>  
2 Plaintiff's failures to abide by these provisions prior to filing suit are failures that cannot be  
3 cured with leave to amend its Complaint.

4 **1. Plaintiff fails to allege that it is a proper assignee of the Agreement or**  
5 **the Initial SOW with the right to bring this claim.**<sup>5</sup>

6 The underlying Agreement and the Initial SOW<sup>6</sup> that Plaintiff now seeks to enforce are  
7 between AT&T Services, Inc. and a company called Mya Number, LLC. Plaintiff Network  
8 Apps, LLC is *not* a party to either agreement. Thus, Plaintiff has no rights under either  
9 document and its claim for breach of contract should be dismissed. See *Collins v. Quintana*,  
10 Case No. 15-cv-1619 (RAJ), 2016 U.S. Dist. LEXIS 11000, at \*5-6 (W.D. Wash. Jan. 28, 2016)  
11 (dismissing breach of contract claim where the parties did not have a contractual relationship).  
12 Plaintiff provides only a conclusory allegation that "Network Apps *now owns* all the assets,

13 <sup>3</sup> All lettered exhibits referred to herein are exhibits to the Declaration of Lindsay M. White Filed In Support of this  
14 Motion unless otherwise stated.

15 <sup>4</sup> Although the Complaint does not explicitly cite the Agreement, it does expressly cite the Initial SOW, which  
16 states: "[REDACTED]" Ex. B (emphasis added).

17 Under the "incorporation by reference" doctrine, a court may consider documents "whose contents are alleged in a  
18 complaint and whose authenticity no party questions, but which are not physically attached to the [Plaintiff's]  
19 pleading." *Kniesel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citation omitted). Moreover, a document may be  
20 incorporated by reference when "the plaintiff's claim depends on the contents of a document" even though its  
21 contents are not specifically alleged in the complaint. *Id.* (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.  
22 1998) (superseded by statute on other grounds)); see also *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47  
23 (2d Cir. 1991) ("In addition, we have held that when a plaintiff chooses not to attach to the complaint or incorporate  
24 by reference a prospectus upon which it solely relies and which is integral to the complaint, the defendant may  
25 produce the prospectus when attacking the complaint for its failure to state a claim, because plaintiff should not so  
26 easily be allowed to escape the consequences of its own failure."); *Warren v. Fox Family Worldwide, Inc.*, 171 F.  
Supp. 2d 1057, 1064 (C.D. Cal. 2001) aff'd, 328 F.3d 1136 (9th Cir. 2003) (dismissing claims under Rules 12(b)(1)  
and 12(b)(6) and allowing consideration of agreements not attached to the complaint because the plaintiff's claims  
were based upon "defendants' alleged breach of these agreements" so the complaint "necessarily relie[d] upon the  
agreements").

23 <sup>5</sup> Although the Complaint includes as Exhibit A the Limited Application Programming Interface Usage Agreement  
24 between AT&T Mobility LLC and Mya Number LLC, Plaintiff has not alleged a breach of contract claim based on  
that agreement. See Dkt. #1, Ex. A; see also *id.* at p. 7 ¶¶ 19-20.

25 <sup>6</sup> Although the Initial SOW sent to Mya Number for signature mistakenly omitted one page containing portions of  
Sections 5(f) and 6, the page of the draft version containing the agreed content of those sections (page 7) has been  
26 included in Exhibit B for completeness. In any event, the content of those sections has no impact on this motion.



1 including the patent, copyrights, trade secrets (collectively ‘Intellectual Property’), *contracts*,  
2 and claims (collectively ‘Assets’) of Mya Number, Inc., an inactive, Washington corporation.”  
3 Dkt. #1, at p. 2, ¶ 2 (emphasis added).<sup>7</sup> Although the Complaint refers to Mya Number, *Inc.*, *id.*,  
4 both the Agreement and the Initial SOW are between AT&T Services, Inc. and Mya Number,  
5 *LLC*, *not* Mya Number, *Inc.* See Exs. A and B. Thus, it is unclear what “assets” (if any)  
6 Plaintiff alleges it “now owns” from Mya Number, *Inc.* Moreover, other than this conclusory  
7 allegation that Plaintiff now “owns” Mya Number, Inc.’s “contracts,” Dkt. #1 at p. 2, ¶ 2,  
8 Plaintiff fails to state which “contracts” it allegedly owns, fails to allege that it owns any  
9 contracts from Mya Number, LLC (the signatory to the Agreement and the Initial SOW), and  
10 fails to allege that it was assigned rights under the Agreement or the Initial SOW between Mya  
11 Number, LLC and AT&T Services, Inc.

12 Even if Plaintiff alleged that it was assigned rights pursuant to the Agreement or the  
13 Initial SOW, it still fails to allege that AT&T Services, Inc. provided written consent to any such  
14 assignment, or that AT&T Services, Inc. was notified pursuant to the assignment provision of the  
15 Agreement, which is also applicable to the Initial SOW, which states:



21 Ex. A (Agreement, Section 32) (emphasis added).<sup>8</sup> Plaintiff’s allegation that it “owns”  
22 “contracts” is conclusory at best. Plaintiff was not the original signatory to the Agreement or the

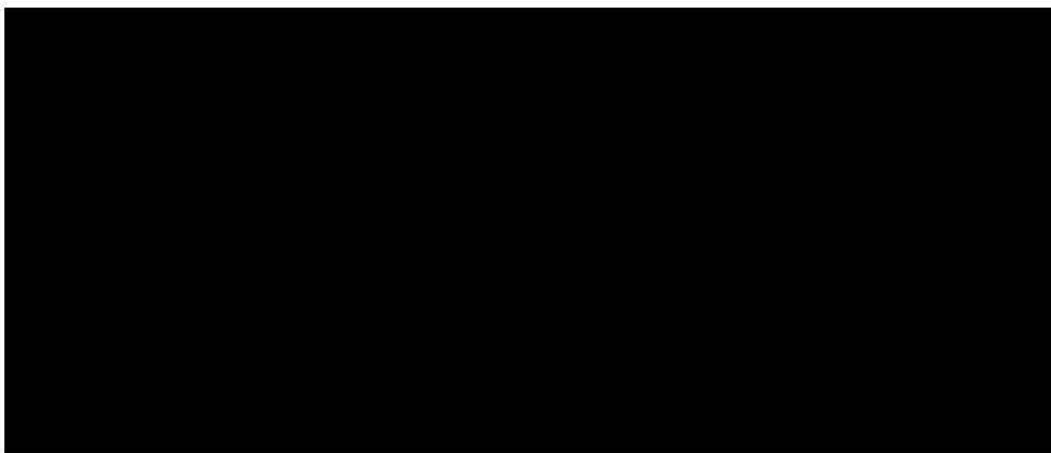
23 <sup>7</sup> Moreover, Plaintiff’s allegation that “Mr. Shei is also the co-inventor of the Intellectual Property developed at Mya  
24 Number, which was recently acquired by Network Apps,” Dkt. #1 at p. 2, ¶ 3; *see also id.* ¶ 4 (similar), is  
25 ambiguous and refers only to the “Intellectual Property” and not the “Assets” which Plaintiff previously defined to  
26 include the “contracts, and claims” of Mya Number, Inc., *id.* at p. 2, ¶ 2.

<sup>8</sup> The Complaint incorrectly states that the Initial SOW (20140530.016.S.001) was executed on June 27, 2013. Both  
the Agreement and the Initial SOW were executed on June 27, 2014. Exs. A and B; *see also* Dkt. #1 at p. 10, ¶ 31.

1 Initial SOW, and Plaintiff has not alleged any facts suggesting that the above assignment  
2 provision was satisfied. *See Citoli v. City of Seattle*, 115 Wn. App. 459, 476 (2002) (“To bring a  
3 cause of action for breach of contract, [Plaintiff] must establish the existence of a valid and  
4 enforceable contract, *the rights of the plaintiff* and obligations of the defendant *under the*  
5 *contract*, violation of the contract by the defendant, and damages to the plaintiff.” (emphasis  
6 added)); *see also Collins*, 2016 U.S. Dist. LEXIS 11000, at \*5-6 (dismissing breach of contract  
7 claim because there was “no contractual relationship with Defendant”). Nor could Plaintiff  
8 allege such facts. Neither Plaintiff nor Mya Number provided written notice of any assignment  
9 of the Agreement or the Initial SOW pursuant to (i) and (ii) of Section 32, let alone received  
10 AT&T Services, Inc.’s written consent to such assignment.<sup>9</sup> Thus, Plaintiff fails to allege any  
11 facts sufficient to show that it is an assignee of the Agreement or the Initial SOW in order to  
12 bring this breach of contract claim, which further supports dismissal.

13           2.     **Plaintiff fails to allege any facts that it complied with the mandatory**  
14                   **dispute resolution provision of the Agreement prior to bringing its**  
                  **breach of contract claim.**

15           Plaintiff failed to abide by and failed to allege that it complied with the mandatory  
16 dispute resolution provision of the Agreement prior to filing this lawsuit, which requires:



24 \_\_\_\_\_  
25 <sup>9</sup> Although not alleged in the Complaint, any allegation that Plaintiff is a beneficiary of the Agreement is equally  
26 unsupported, as the Agreement explicitly states that [REDACTED]  
Ex. A (Agreement, Section 25(h)).



1 [REDACTED]  
2 [REDACTED]  
3 Ex. A (Agreement, Section 28) (emphasis added).

4 Courts have dismissed breach of contract claims as unripe where, as here, the parties  
5 failed to abide by the dispute resolution provisions prior to filing suit. *See Nikoonahad v.*  
6 *Rudolph Techs., Inc.*, Case No. 08-cv-2290 (PVT), 2009 U.S. Dist. LEXIS 40696, at \*13 (N.D.  
7 Cal. May 13, 2009) (dismissing insufficiently pled breach of contract claims, stating that even if  
8 those claims were sufficiently pled, the dispute resolution provision was not followed and thus,  
9 the “breach of contract claims are [] unripe and will be dismissed.”); *see also Centaur Corp. v.*  
10 *On Semiconductor Components Indus., LLC*, Case No. 09-cv-2041 (BLM), 2010 U.S. Dist.  
11 LEXIS 8495, at \*7-9 (S.D. Cal. Feb. 2, 2010) (granting motion to dismiss because “[f]ailure to  
12 mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a  
13 lawsuit warrants dismissal.” (citation omitted)). Because Plaintiff fails to plead facts sufficient  
14 to show that its breach of contract claim is ripe, its claim should be dismissed. And given that  
15 Plaintiff’s failures to abide by these provisions prior to filing suit are failures that cannot be  
16 cured, Plaintiff’s breach of contract claim should be dismissed without leave to amend its  
17 Complaint.<sup>11</sup>

18 **D. Plaintiff’s Minimal Allegations in its Trade Secret Misappropriation Claim**  
19 **Are Insufficient to Survive a Motion to Dismiss.**

20 As a preliminary matter, Plaintiff fails to specify the law under which it brings its claim  
21 for trade secret misappropriation, which by itself warrants dismissal. Regardless of the law to be  
22 applied, Plaintiff fails to state a claim upon which relief can be granted under both the

23 \_\_\_\_\_  
24 <sup>10</sup> Although this dispute resolution provision states that it does not apply to [REDACTED]  
[REDACTED] those exceptions are inapplicable to Plaintiff’s  
breach of contract claim, which is based on an alleged failure to pay royalties.

25 <sup>11</sup> To the extent Plaintiff alleges breach of contract based on alleged trade secret misappropriation, that breach of  
26 contract claim is necessarily preempted by Plaintiff’s trade secret misappropriation claim. RCW 19.108.900(2)(a).

1 Washington Uniform Trade Secrets Act (“WUTSA”) and the federal Defend Trade Secrets Act  
2 (“DTSA”). Plaintiff’s failure to allege *any* facts regarding its reasonable efforts to maintain the  
3 secrecy of its alleged trade secrets or how its alleged trade secrets derive independent economic  
4 value justifies dismissal of this claim under both laws. Plaintiff’s failures to adequately describe  
5 the information it contends constitutes a trade secret or provide more than a mere conclusory  
6 assertion that Defendants misappropriated its trade secrets further justify dismissal.<sup>12</sup>

7 **1. Plaintiff fails to state a claim upon which relief can be granted under**  
8 **the WUTSA.**

9 Plaintiff’s trade secret misappropriation claim, if made pursuant to the WUTSA, should  
10 be dismissed because it fails to state sufficient facts to show that it has a legally protectable trade  
11 secret or that its alleged trade secret was misappropriated.

12 First, Plaintiff must plead, at a bare minimum, that it has a legally protectable trade secret  
13 pursuant to the WUTSA by establishing (1) that the information derives independent economic  
14 value from not being generally known or readily ascertainable to others who can obtain  
15 economic value from knowledge of its use, and (2) that reasonable efforts have been taken to  
16 maintain the secrecy of the information. *See Baden Sports, Inc. v. Wilson Sporting Goods Co.*,  
17 Case No. 11-0603-MJP, 2011 U.S. Dist. LEXIS 81433, at \*2 (W.D. Wash. July 26, 2011); *see*  
18 *also* RCW 19.108.010(4). Moreover, a “vague description” of the product at issue without  
19 identification of what components are protected by trade secrets is insufficient to survive a  
20 motion to dismiss. *Baden Sports*, 2011 U.S. Dist. LEXIS 81433, at \*2 (dismissing trade secret  
21 misappropriation claim when the party failed to specify in its complaint which components, or  
22 combination of components, of a device are trade secrets); *see also Cascade Designs, Inc. v.*

23  
24  
25 <sup>12</sup> Moreover, if Plaintiff intends to argue that any information disclosed in its Complaint or its Exhibit B are trade  
26 secrets, Plaintiff itself publicly disclosed that information in its filing of this lawsuit, and thus, that information is no  
longer secret, to the extent it ever was.



1 *Windcatcher Tech. LLC*, Case No. 15-cv-1310 (TSZ), 2016 U.S. Dist. LEXIS 11767, at \*5-6  
2 (W.D. Wash. Feb. 1, 2016) (same).

3 Here, Plaintiff fails to plead any facts regarding how its alleged trade secrets derive  
4 independent economic value or its reasonable efforts to maintain the secrecy of the information,  
5 requiring dismissal of this claim. Moreover, Plaintiff's overly broad description of its alleged  
6 trade secrets as "all source and executable codes, and derivative works therein, developed by  
7 Mya Number for NumberSync," *see* Dkt. #1 at pp. 10, 13, ¶¶ 33, 51, is insufficient to identify  
8 what components or combination of components, if any, are protectable trade secrets.<sup>13</sup>  
9 Plaintiff's failure to plead facts sufficient to show that it has a legally protectable trade secret  
10 pursuant to the WUSTA justifies dismissal of any such claim.

11 Second, Plaintiff must plead sufficient facts to allege that Defendants misappropriated its  
12 alleged trade secrets, but has not done so. Although the pleading standard "does not need  
13 'detailed factual allegations,' [it] requires more than labels and conclusions, and a formulaic  
14 recitation of the elements of a cause of action." *nexTUNE, Inc. v. McKinney*, Case No. 12-cv-  
15 1974 (TSZ), 2013 U.S. Dist. LEXIS 77128, at \*10 (W.D. Wash. May 31, 2013). Here, Plaintiff  
16 merely recites that "AT&T copied or has used Network Apps' trade secrets in deployment of  
17 NumberSync," "AT&T has misappropriated Plaintiff's trade secrets," and "AT&T's  
18 misappropriation is intentional." Dkt. #1 at p. 13, ¶¶ 52-54. Such mere formulaic recitations of  
19 "misappropriation," the second element for this cause of action, are insufficient to survive a  
20 motion to dismiss. *See nexTUNE*, 2013 U.S. Dist. LEXIS 77128, at \*10.

21  
22  
23 <sup>13</sup> Plaintiff also states: "***Mya Number also owns*** intellectual property, not claim[ed] in the '728 Patent, in copyrights  
24 and trade secrets that include, but are not limited to SDK/APKs for OEM hardware integration, messaging services,  
25 other executable and non-executable code, and an end-user interface to connect the NumberSync Grouping, Call  
26 Delivery, and Messaging Services Platform to the AT&T network and the OEM hardware." Dkt. #1 at p. 10, ¶ 33  
(emphasis added). That assertion is inconsistent with Plaintiff's statement that it "now owns all the assets . . . of  
Mya Number, Inc." *Id.* at pp. 2, 10, ¶¶ 2, 33. It is entirely unclear what technology Plaintiff owns. In any event,  
this statement is equally vague and insufficient.

1                   **2.     Plaintiff fails to state a claim upon which relief can be granted under**  
2                   **the DTSA.**

3             Plaintiff's trade secret misappropriation claim, if made pursuant to the recently enacted  
4 DTSA, should also be dismissed because it fails to allege a nexus between interstate or foreign  
5 commerce and the alleged trade secrets or allegedly infringing services, and as discussed above  
6 fails to state sufficient facts to show that it has a legally protectable trade secret.

7             The DTSA creates a private cause of action for the owner of a trade secret "if the trade  
8 secret is related to a product or service used in, or intended for use in, interstate or foreign  
9 commerce." 18 U.S.C. § 1836(b)(1). In addition and similar to the WUTSA, to be a trade  
10 secret, the DTSA requires that "(A) the owner thereof has taken reasonable measures to keep  
11 such information secret; and (B) the information derives independent economic value, actual or  
12 potential, from not being generally known to, and not being readily ascertainable through proper  
13 means by, another person who can obtain economic value from the disclosure or use of the  
14 information." 18 U.S.C. § 1839(3).

15             Here, the Complaint is wholly silent as to any allegations of a nexus between interstate or  
16 foreign commerce and either Plaintiff's alleged trade secrets or Defendants' NumberSync  
17 service. *See Hydrogen Master Rights Ltd. v. Weston*, Case No. 16-cv-474 (RGA), 2017 WL  
18 78582, at \*10 (D. Del. Jan. 9, 2017) (dismissing DTSA claim where plaintiff failed to allege a  
19 nexus between interstate or foreign commerce). Moreover, similar to its shortcomings under the  
20 WUTSA, Plaintiff fails to mention any facts regarding its reasonable measures to keep its alleged  
21 trade secrets secret or that its alleged trade secrets derive independent economic value from not  
22 being generally known. *See M.C. Dean, Inc. v. City of Miami Beach, Florida*, Case No. 16-cv-  
23 21731 (CMA), 2016 WL 4179807, at \*7-8 (S.D. Fl. Aug. 8, 2016) (dismissing state and DTSA  
24 claims for failure to state plausible claims for relief). These failures to properly plead a DTSA  
25 claim warrant dismissal.

1           **E. Plaintiff's Allegations of Patent Infringement Cannot Survive a Motion to**  
2           **Dismiss.**

3           Plaintiff fails to properly plead its claim that Defendants “[are] and ha[ve] been directly  
4           infringing, contributing to the infringement of, and/or inducing others to infringe the ’728  
5           Patent.”<sup>14</sup> Dkt. #1 at p. 14, ¶ 57. Plaintiff also fails to allege any facts to support its prayer for  
6           relief for willful infringement. *Id.* at p. 15, ¶ 69. Accordingly, all of its patent infringement  
7           claims should be dismissed.

8                   **1. Plaintiff fails to allege facts sufficient to allow the Court to infer that**  
9                   **the accused product infringes each element of at least one claim of the**  
                  **Asserted Patent to support a claim for direct patent infringement.**

10          Plaintiff fails to address the claim language of the Asserted Patent and fails to describe  
11          how the alleged activities constitute infringement, requiring dismissal of its claim for direct  
12          patent infringement. Post-Form 18,<sup>15</sup> courts have held that “a plaintiff must include allegations  
13          sufficient to permit the court to infer that the accused product infringes *each element of at least*  
14          *one claim.*” *TeleSign Corp. v. Twilio, Inc.*, Case No. 16-cv-2106 (PSG), 2016 WL 4703873, at  
15          \*3 (C.D. Cal. Aug. 3, 2016) (emphasis added) (granting motion to dismiss); *see also Robern, Inc.*  
16          *v. Glasscrafters, Inc.*, Case No. 2:16-cv-01815 (JMV), 2016 WL 3951726, at \*5 (D.N.J. July 22,  
17          2016) (granting motion to dismiss because Plaintiff “failed to relate factual assertions to the  
18          pertinent claims”); *Ex. C (RainDance Techs. Inc., v. 10x Genomics, Inc., No. 15-cv-00152*  
19          *(RGA), slip op.*, Dkt. #28, at \*4 (D. Del. Mar. 4, 2016) (granting motion to dismiss because  
20          “Plaintiff makes no attempt to relate any [sic] their factual assertions with any of the asserted  
21          claims”)). Thus, “a plaintiff must still plausibly allege that a defendant’s product or products

22  
23          <sup>14</sup> Although the Complaint alleges that “the ’728 Patent was assigned to” Plaintiff from Mya Number, *Inc.*, it fails to  
24          include any allegations related to Mya Number, *Corp.*, which is the assignee on the face of the patent and is a  
25          wholly separate entity from Mya Number, *Inc.* *See* Dkt. #1 at p. 2, ¶ 2; *see also id.*, Ex. D (’728 Patent).

26          <sup>15</sup> The December 2015 amendments to the Federal Rules of Civil Procedure abrogated Rule 84 and Form 18. *See*  
        *TeleSign Corp.*, 2016 WL 4703873, at \*2. Because Plaintiff filed its Complaint (December 3, 2016) well after the  
        amendments took effect (December 1, 2015), Plaintiff must plead infringement under the Supreme Court’s standard  
        in *Iqbal* and *Twombly*, and the Ninth Circuit’s standard in *Starr*. *Starr*, 652 F.3d at 1216.

1 practice all elements of at least one patent claim.” *TeleSign Corp.*, 2016 WL 4703873, at \*4  
2 (citing *Atlas IP, LLC v. Exelon Corp.*, Case No. 15-cv-10746, 2016 WL 2866134, at \*5 (N.D. Ill.  
3 May 17, 2016) (granting motion to dismiss); *Asghari-Kamrani v. United Servs. Auto. Ass’n*, Case  
4 No. 2:15-cv-478, 2016 WL 1253533, at \*4 (E.D. Va. Mar. 22, 2016) (same); *Atlas IP LLC v.*  
5 *Pac. Gas & Elec. Co.*, Case No. 15-cv-05469-EDL, 2016 WL 1719545, at \*3-5 (N.D. Cal. Mar.  
6 9, 2016) (same)).

7 Here, Plaintiff wholly fails to address the claim language or describe how the alleged  
8 activities constitute infringement of each element of at least one claim. Instead, Plaintiff merely  
9 alleges that Defendants “integrated” Mya Number’s technology “into the AT&T network” and  
10 “deployed” NumberSync using “intellectual property that is protected by the ’728 Patent, trade  
11 secrets and copyrights.” Dkt. #1 at p. 13, ¶ 35. Moreover, Plaintiff’s conclusory allegations that  
12 Defendants “infringe the ’728 Patent by making, using, selling, and/or offering to sell in the  
13 United States, or importing into the United States products or processes that practice the  
14 inventions claimed in the ’728 Patent, including without limitation the offering of NumberSync  
15 to all subscribers to the AT&T network” and infringe at least “each independent claim of the  
16 ’728 Patent” are insufficient, as independent Claims 1, 8, and 17 each require multiple steps or  
17 components. *Id.* at p. 14, ¶¶ 57, 59.

18 Claim 1 is exemplary, requiring numerous distinct steps involving multiple components  
19 (in addition to other limitations):

- 20 1. A method for telephone number grouping, comprising:  
21 ***provisioning, by a telephone service provider, a plurality of telephone numbers***  
22 ***including associating each of the plurality of telephone numbers with a***  
23 ***distinct physical telephone service user device of a grouped plurality of***  
24 ***physical telephone service user devices***, the quantity of the plurality of  
25 telephone numbers being no greater than the quantity of the grouped  
26 plurality of physical telephone service user devices;  
***registering, with a telephone number grouping service, at least two telephone***  
***numbers of the plurality of telephone numbers as grouped telephone***  
***numbers*** with respect to incoming and outgoing telephone calls to and  
from the grouped plurality of physical telephone service user devices;

1 ***providing, by the telephone service provider to the telephone number grouping***  
2 ***service, at least partial call control for incoming and outgoing telephone***  
3 ***calls*** with respect to the grouped telephone numbers;

4 with respect to incoming telephone calls to the grouped telephone numbers,  
5 ***activating one or more of the grouped plurality of physical telephone***  
6 ***service user devices associated with the grouped telephone numbers in***  
7 ***accordance with a grouped telephone number incoming call policy*** that  
8 governs incoming telephone calls to the grouped plurality of physical  
9 telephone service user devices, the grouped telephone number incoming  
10 call policy ***being capable of causing activation of multiple of the grouped***  
11 ***plurality of physical telephone service user devices responsive to an***  
12 ***incoming call***; and

13 with respect to an outgoing telephone call from a physical telephone service user  
14 device associated with the grouped telephone numbers, ***causing the***  
15 ***outgoing telephone call to appear to originate from a selected telephone***  
16 ***number of the grouped telephone numbers in accordance with a***  
17 ***grouped telephone number outgoing call policy*** that governs outgoing  
18 telephone calls from the grouped plurality of physical telephone service  
19 user devices, the grouped telephone number outgoing call policy ***being***  
20 ***capable of designating each of the grouped telephone numbers***  
21 ***associated with the grouped plurality of physical telephone service user***  
22 ***devices as the selected telephone number.***

23 Dkt. #1, Ex. D (Claim 1) (emphasis added). Plaintiff does not state how Defendants allegedly  
24 infringe any of these steps or components. The Court cannot infer from Plaintiff's threadbare  
25 allegations that all elements of at least one claim are infringed (or even that any element of any  
26 claim is infringed), requiring dismissal of Plaintiff's claim for direct patent infringement. *See*  
*TeleSign Corp.*, 2016 WL 4703873, at \*4.

Dismissal of Plaintiff's claim for direct patent infringement necessarily dooms Plaintiff's  
inducement, contributory, and willfulness claims as well. *See Limelight Networks, Inc. v.*  
*Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117-18 (2014); *see also TeleSign Corp.*, 2016 WL  
4703873, at \*4. Nonetheless, additional bases for dismissal of each of those claims are  
addressed below.

1                   2.     Plaintiff's allegations are wholly deficient to support its claim for  
2                   willful infringement.

3             Plaintiff does not specifically allege a separate claim for willful infringement, but its  
4     prayer for relief requests that this Court find Defendants' alleged infringement to be willful. *See*  
5     Dkt. #1 at p. 15, ¶ 69. In any event, as Plaintiff fails to sufficiently plead a claim for willful  
6     infringement, any such claim should be dismissed. To state a claim for willful infringement,  
7     "[k]nowledge of the patent alleged to be willfully infringed continues to be a prerequisite to  
8     enhanced damages." *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016) (citing  
9     *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932-33 (2016)). Courts have likewise  
10    explained post-*Halo* that the "subjective willfulness of a patent infringer, **intentional or**  
11    **knowing**, may warrant enhanced damages." *Princeton Dig. Image Corp. v. Ubisoft Entm't SA*,  
12    Case No. 13-cv-335 (LPS), 2016 WL 6594076, at \*11 (D. Del. Nov. 4, 2016) (citing *Halo*, 136  
13    S. Ct. at 1932-34) (emphasis added)). Because there are no allegations in the Complaint that  
14    Defendants knew of the '728 Patent (or its application) prior to the filing of the Complaint, any  
15    pre-suit willfulness allegations should be dismissed as legally deficient. *See id.*

16            Moreover, any allegations of post-suit willfulness should similarly be dismissed, as the  
17    Complaint "fails to allege any facts suggesting that [Defendants'] conduct is egregious . . .  
18    beyond typical infringement." *CG Tech. Dev., LLC v. Big Fish Games, Inc.*, Case No. 2:16-cv-  
19    00587 (RCJ), 2016 WL 4521682, at \*14 (D. Nev. Aug. 29, 2016). In particular, Plaintiff's  
20    Complaint is unlike the complaint in *Simplivity Corp. v. Springpath, Inc.*, which the court held  
21    sufficient to withstand a motion to dismiss post-complaint willfulness under the *Halo* standard,  
22    as it alleged that the defendant had "escalat[ed] . . . infringing activities after receipt of the  
23    original Complaint." Case No. 4:15-cv-13345-TSH, 2016 WL 5388951, at \*18 & n. 32 (D.  
24    Mass. July 15, 2016). There are no such factual allegations here and any claim for willfulness,  
25    pre- or post-suit, should be dismissed accordingly.

1                   **3. Plaintiff fails to allege that the allegedly infringing activities or**  
2                   **components have no substantial non-infringing use to support a claim**  
3                   **for contributory infringement.**

4                   Plaintiff fails to plead facts sufficient to support a claim for contributory infringement.  
5                   Contributory infringement requires Plaintiff to plead that “(1) Defendant[s] knew that the  
6                   combination for which [their] component was especially designed was both patented and  
7                   infringing” and “(2) that the accused products have no substantial non-infringing uses.” Ex. D  
8                   (*CAP Co., Ltd. v. Microsoft Corp.*, Case No. 14-cv-1899 (MJP), slip op., Dkt. #70, at \*4 (W.D.  
9                   Wash. Apr. 6, 2015) (citations omitted)).

10                  Here, Plaintiff fails to allege that Defendants had knowledge of the Asserted Patent or  
11                  knowledge that their actions constituted patent infringement, each of which is required for a  
12                  contributory infringement claim. *See infra* § II(E)(4); *see also* Ex. E (*Hark C. Chan v. AT&T*  
13                  *Mobility LLC*, Case No. 11-cv-01766 (JLR), slip op., Dkt. #39, at \*8-10 (W.D. Wash. July 18,  
14                  2012) (dismissing contributory infringement claim)); *see also* Ex. F (*Illumina, Inc. v. Life Tech.*  
15                  *Co.*, Case No. 11-cv-3022 (JAH – DHB), slip op., Dkt. #67, at \*13 (S.D. Cal. Sept. 22, 2016)  
16                  (same)).

17                  In addition, Plaintiff fails to allege the second element for a contributory infringement  
18                  claim: that the activities or components alleged to infringe have “no substantial non-infringing  
19                  use.” Ex. D (*CAP Co.*, Case No. 14-cv-1899 (MJP), slip op., Dkt. #70, at \*4-5 (W.D. Wash.  
20                  Apr. 6, 2015) (dismissing contributory infringement claim for failure to include allegations of  
21                  non-infringing use)). Moreover, the Complaint is exceedingly vague as to what specific  
22                  activities (other than “deploy[ing]” and “integrating . . . into the AT&T network”) and what  
23                  specific components or systems purportedly infringe the claims of the Asserted Patent.  
24                  Accordingly, Defendants are unable to analyze which activities, components, or systems would  
25                  need to have “no substantial non-infringing use.”  
26

1 In short, the Complaint fails to plead facts sufficient to support a claim for contributory  
2 infringement and that claim should be dismissed.

3 **4. Plaintiff fails to allege that Defendants intended for their customers to**  
4 **infringe or that they knew that their customers' acts constituted**  
5 **infringement to support a claim for induced infringement.**

6 Plaintiff fails to plead facts sufficient to support its claim for induced infringement. To  
7 properly plead a claim of induced infringement, Plaintiff must plead facts sufficient to show that  
8 (1) Defendants' customers directly infringed, (2) Defendants intended to induce their customers  
9 to infringe, and (3) Defendants knew of the Asserted Patent and knew that their customers' acts  
10 constituted patent infringement. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed.  
11 Cir. 2006). Induced infringement will occur only "if the party being induced directly infringes  
12 the patent." *Crystal Semiconductor Corp. v. TriTech Microelecs. Int'l, Inc.*, 246 F.3d 1336, 1351  
13 (Fed. Cir. 2001). "[M]ere knowledge of possible infringement will not suffice." *Vita-Mix Corp.*  
14 *v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009). The intent requirement "requires  
15 more than just intent to cause the acts that produce direct infringement. Beyond that threshold  
16 knowledge, the inducer must have an affirmative intent to cause direct infringement . . .  
17 requir[ing] that the alleged infringer knowingly induced infringement and possessed specific  
18 intent to encourage another's infringement." *DSU Med.*, 471 F.3d at 1306 (internal quotation  
19 marks and citations omitted). The "Supreme Court has explained that the term induce as it is  
20 used in § 271(b) means to lean on; to influence; to prevail on; to move by persuasion," thus,  
21 "successful communication between the alleged inducer and the third-party direct infringer" is  
22 necessary. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 843 F.3d 1315, 1331  
23 (Fed. Cir. 2016) (internal quotation marks omitted) (quoting *Global-Tech Appliances, Inc. v.*  
24 *SEB S.A.*, 563 U.S. 754, 760 (2011)). Finally, induced infringement requires more than mere  
25 knowledge that a product is being used, it "requires knowledge that the induced acts constitute  
26 patent infringement." *Global-Tech Appliances*, 563 U.S. at 766.



1 The Complaint here wholly fails to address requisite elements (1) through (3) for induced  
2 infringement: failing to allege that Defendants’ customers directly infringe, failing to allege that  
3 Defendants had knowledge of the Asserted Patent, and failing to allege that Defendants knew  
4 that their customers’ acts constituted patent infringement. The only allegations in the Complaint  
5 that could be argued to support these elements are entirely conclusory and lack any factual  
6 support: “Defendants’ collective actions to induce customers to use the intellectual property in  
7 question,” Dkt. #1 at p. 5, ¶ 15; “AT&T now offers NumberSync, *i.e.*, ‘twinning’, as a standard  
8 value-add for all subscribers in the AT&T network,” *id.* at p. 10, ¶ 35; “AT&T has offered and  
9 continues to offer to its entire subscriber base products that are protected by the ’728 Patent,  
10 trade secrets, and/or copyrights,” *id.*; and “AT&T is and has been ... inducing others to infringe  
11 ... including without limitation the offering of NumberSync to all subscribers to the AT&T  
12 network,” *id.* at p. 14, ¶ 57. These threadbare, conclusory allegations provide absolutely no  
13 factual support regarding any direct infringement by Defendants’ customers, Defendants’  
14 knowledge of the Asserted Patent, or Defendants’ knowledge that their customers’ acts  
15 constituted patent infringement. *See* Ex. F (*Illumina*, Case No. 11-cv-3022 (JAH – DHB), slip  
16 op., Dkt. #67, at \*13 (S.D. Cal. Sept. 22, 2016) (dismissing induced infringement claim because  
17 the “[p]laintiff sets forth no allegations of direct infringement by any third party to support  
18 induced infringement” and even though the plaintiff “repeatedly references ‘users’ in the FAC,  
19 its allegations surrounding ‘users’ simply assert Defendants offer instructions and users’ manuals  
20 with their instruments, reagents and kits. There are no facts to demonstrate infringement by a  
21 third party.”)); *see also* Ex. E (*Hark C. Chan*, Case No. 11-cv-01766 (JLR), slip op., Dkt. #39, at  
22 \*8-10 (W.D. Wash. July 18, 2012) (dismissing induced infringement claim)).

23 Plaintiff’s conclusory statements regarding Defendants’ alleged intent to induce do not  
24 salvage the claim: “Defendants knowingly induce infringement within the State of Washington  
25 and this district by contracting with others to market and sell infringing products and services  
26 with the knowledge and intent to facilitate infringing sales and use of the products and services

1 by others within Washington and this district,” Dkt. #1 at p. 4, ¶ 12, and “AT&T’s infringement  
2 is intentional,” *id.* at p. 14, ¶ 60. Indeed, Plaintiff’s threadbare allegations fail to sufficiently  
3 address the required element of intent, making no mention of any alleged communication  
4 between Defendants and their customers intended to encourage infringement, as expressly  
5 required by recent Federal Circuit cases. *See Power Integrations*, 843 F.3d at 1331; *see also* Ex.  
6 D (*CAP Co.*, Case No. 14-cv-1899 (MJP), slip op., Dkt. #70, at \*4-5 (W.D. Wash. Apr. 6, 2015)  
7 (dismissing induced infringement claim)). Plaintiff’s claim for induced infringement is deficient  
8 and should be dismissed.

9 **III. PLAINTIFF’S STATE LAW CLAIMS OF BREACH OF CONTRACT AND**  
10 **TRADE SECRET MISAPPROPRIATION SHOULD BE DISMISSED PURSUANT**  
11 **TO RULE 12(B)(1)**

12 As a threshold issue, Plaintiff fails to sufficiently plead facts allowing this Court to  
13 exercise subject matter jurisdiction over Plaintiff’s state law claims. Plaintiff’s alleged basis for  
14 subject matter jurisdiction is “under 28 U.S.C. § 1331, § 1332, and § 1338(a) because this action  
15 arises under the patent laws of the United States, including, 35 U.S.C. § 271 et seq.” *See* Dkt. #1  
16 at p. 4, ¶ 10. However, in addition to its federal claims for copyright and patent infringement,  
17 Plaintiff also asserts state law claims for breach of contract and trade secret misappropriation.<sup>16</sup>  
18 While Plaintiff generally cites to diversity of citizenship jurisdiction under § 1332, Plaintiff does  
19 not allege sufficient facts in support of either diversity jurisdiction or supplemental jurisdiction  
20 over these state law claims. In particular, for diversity jurisdiction under § 1332, Plaintiff must  
21 allege that the controversy exceeds the sum or value of \$75,000, which it has not done. *See*  
22 *Rainero v. Archon Corp.*, 844 F.3d 832, 840 (Fed. Cir. 2016) (holding that the “district court  
23 correctly determined that it lacked diversity jurisdiction” because the “lack of pleading as to  
24 diverse citizenship and amount in controversy . . . plainly failed to allege the essential elements  
25 of diversity jurisdiction, required under § 1332(a).” (internal citation omitted)). Moreover, as a

26 <sup>16</sup> As discussed in more detail above, Plaintiff does not specify whether its trade secret misappropriation claim is  
pursuant to state or federal law. Defendants nonetheless address both potential claims throughout this motion.

1 limited liability company, Plaintiff must also allege the citizenship of its members because “an  
2 LLC is a citizen of every state of which its owners/members are citizens,” which it has not done.  
3 *See Johnson v. Columbia Prop. Anchorage, LP*, 437 F.3d 894, 899 (Fed. Cir. 2006); *see also*  
4 *North American Wellness Center, LLC v. Holmes*, Case No. 3:14-cv-2584 (CAB), 2015 WL  
5 1291372, at \*2 (S.D. Cal. Mar. 23, 2015) (dismissing complaint where plaintiff failed to  
6 adequately plead diversity jurisdiction). Federal Rule of Civil Procedure 12(b)(1) requires  
7 dismissal of a claim if the Court finds it lacks subject matter jurisdiction. Because “[f]ederal  
8 courts are courts of limited jurisdiction” (*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.  
9 375, 377 (1994)), “[a] federal court is presumed to lack subject matter jurisdiction until plaintiff  
10 establishes otherwise.” *nexTUNE*, 2013 U.S. Dist. LEXIS 77128, at \*8. This Court in similar  
11 situations has dismissed plaintiff’s state law claims for lack of jurisdiction. *See id.* at \*7-9  
12 (dismissing state law claim where plaintiff failed to specifically allege either diversity  
13 jurisdiction or supplemental jurisdiction over its state law claims). Likewise, here, Plaintiff’s  
14 state law claims should be dismissed.

15 **IV. IN THE ALTERNATIVE, THIS CASE SHOULD BE TRANSFERRED TO THE**  
16 **SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1404(A)**

17 Transfer of this case to the S.D.N.Y. is appropriate because the forum selection clause of  
18 the Agreement requires that suit be brought in New York, New York:



22 Ex. A (Agreement, Section 6) (emphasis added). A forum-selection clause “*should be given*  
23 *controlling weight in all but the most exceptional cases.*” *United States v. Int’l Fidelity*

24 \_\_\_\_\_  
25 <sup>17</sup> Defendants maintain that Plaintiff has not properly pleaded facts sufficient to show that it is a proper assignee of  
26 the Agreement. *See supra* § II(C). However, if Plaintiff is deemed to be a proper assignee, this lawsuit should have  
been brought in the S.D.N.Y. pursuant to the forum selection clause of that Agreement.

1 *Insurance Co.*, Case No. 16-5142 (RBL), 2016 WL 5920091, at \*2 (W.D. Wash. Oct. 11, 2016)  
2 (emphasis added). When a forum-selection clause exists, “[t]he clause requires the district court  
3 to modify the usual § 1404(a) analysis in three ways. First, the plaintiff bears the burden of  
4 establishing that transfer to the forum for which the parties bargained is unwarranted. Second, a  
5 court must deem the private-interest factors to weigh entirely in favor of the preselected forum.  
6 Third, when a party bound by a forum-selection clause flouts its contractual obligation and files  
7 suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s  
8 choice-of-law rules[.]” *Id.* (internal citations omitted). Although the “district court may consider  
9 arguments about public interest factors,” “those factors will rarely defeat a transfer  
10 motion . . . [and] forum selection clauses should control except in unusual cases.” *Id.* at \*3.  
11 Thus, the forum selection clause in the Agreement should control, and this case should be  
12 transferred to the S.D.N.Y.

13 **V. CONCLUSION**

14 For the foregoing reasons, Defendants respectfully request that the Court dismiss  
15 Plaintiff’s claims for copyright infringement, breach of contract, misappropriation of trade  
16 secrets, and patent infringement. Alternatively, Defendants respectfully request that the Court  
17 transfer this case to the S.D.N.Y.

1 Dated: March 13, 2017

/s/ Christopher W. Kennerly

2 Christopher W. Kennerly (*pro hac vice*)  
3 Lindsay M. White (*pro hac vice*)  
4 PAUL HASTINGS LLP  
5 1117 S. California Avenue  
6 Palo Alto, California 94304  
7 Telephone: 650-320-1800  
8 Email: chriskennerly@paulhastings.com  
9 Email: lindsaywhite@paulhastings.com

7 Blair M. Jacobs (*pro hac vice*)  
8 PAUL HASTINGS LLP  
9 600 13th Street NW  
10 Washington, DC 20005  
11 Telephone: 202-756-8000  
12 Email: blairjacobs@paulhastings.com

11 Scott T. Wilsdon, WSBA No. 20608  
12 YARMUTH WILSDON PLLC  
13 1420 Fifth Avenue, Suite 1400  
14 Seattle, Washington 98101  
15 Telephone: 206-516-3800  
16 Email: wilsdon@yarmuth.com

15 *Counsel for Defendants AT&T Corp., AT&T*  
16 *Mobility LLC and AT&T Services, Inc.*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

DATED: March 13, 2017, at Palo Alto, California.

/s/ Christopher W. Kennerly